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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 206

VIVEN HARRIS,

Petitioner,

vs.

THE STATE OF NEW YORK,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

	PAGE
Statement	1
Facts	2
Argument	7
The Use to Which the Petitioner's Statement Was Put Was Perfectly Proper	7
POINT I—The illegality of the statement	7
POINT II—No illegal evidence was admitted into evidence in this case	12
POINT III—The petitioner's confession was properly used to impeach his direct testimony	14
POINT IV—The use to which the petitioner's statement was put was in no way prejudicial	29
POINT V—The use of the inadmissible statement could well be harmless error	30
POINT VI—The District Attorney was under no obligation to notify the petitioner in advance of his intention to use the statement for impeachment purposes	33
Conclusion	36
Appendix "A"	37

Cases Cited

PAGE

Brandon v. People, 42 N. Y. 265 .....15, 16

Breedlove v. Beto, 404 F. 2d 1019, 1022, 1023 22

Burgett v. Texas, 389 U. S. 109 L. ed. 2d 319, 88 S. Ct. 258 .....12, 27, 28

Bruton v. United States, 391 U. S. 123, 20 L. ed. 2d 476, 88 S. Ct. 1620 25

Carnley v. Cochran, 369 U. S. 506, 516, 8 L. ed. 2d 70, 77, 82 S. Ct. 884 8

Columbe v. Connecticut, 367 U. S. 568, 6 L. ed. 2d 1037, 81 S. Ct. 1860 7

Commonwealth v. Burkett, 211 Pa. Super, 299, 235 A. 2d 161 13

Commonwealth v. Kleciak, 216 N. E. 2d 417, 350 Mass. 679 18

Commonwealth v. Nichols, 19 A. R. 346, 114 Mass. 285 (1873) 16

Commonwealth v. Tolliver, 119 Mass. 312 17

Crawford v. State, 70 So. 374, 70 Fla. 335 (1915) .. 18

Cross v. State, 221 S. W. 489, 142 Tenn. 510 (1920) 18

Curtiss v. Strong, 4 Day 51, 56 (1809) 24

Desist v. United States, 394 U. S. 244, 22 L. ed. 2d 248, 89 S. Ct. 1030 11

Groshart v. United States, 392 F. 2d 172 19

Grunewald v. United States, 353 U. S. 391, 1 L. ed. 2d 931, 77 S. Ct. 963 22

Harrold v. Territory, 89 P. 202, 18 Okla. 395 .... 17, 20

Harrold v. Territory, 169 F. 47 17

PAGE

Iva Ikuko Toguri D'Aquino v. United States, 192 F. 2d 338, 9th Circ., cert. denied, 343 U. S. 935, 96 L. ed. 1343, 72 S. Ct. 772 29

Jackson v. Denno, 378 U. S. 368, 12 L. ed. 2d 908, 84 S. Ct. 1774 24

Jenkins v. Delaware, 395 U. S. 213, 219 n. 7, 23 L. ed 2d 253, 259, 89 S. Ct. 1677 11

Johnson v. New Jersey, 384 U. S. 719 L. ed. 2d 882, 86 S. Ct. 1772 .....8, 9, 10, 11

Mapp v. Ohio, 367 U. S. 643 35

Massiah v. United States, 377 U. S. 201, 12 L. ed. 2d 246, 84 S. Ct. 1199 13

May v. State, 211 So. 2d 845 (Mississippi, 1968) 14

Miranda v. Arizona, 384 U. S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602 ....7, 8, 9, 10, 11, 18, 19, 20, 21, 26, 28, 34

Omychund v. Barker, 1 Atk. 21, 34 24

People v. Boodie, 257 A. 2d 657, 26 N. Y. 2d 779 14

People v. La Batt, 246 N. E. 2d 108 Ill. A. 2d 18 14

People v. Marsh, 14 Mich. App. 518, 165 N. W. 2d 853 13

People v. Miller, 24 A. D. 2d 1023, 267 N.Y.S. 2d 170 26

People v. Noble, 9 N. Y. 2d 571, 175 N. E. 2d 451 ... 7

People v. Sorge, 301 N. Y. 198 29

People v. Steele, 26 N. Y. 2d 529 26

People v. Sutherland, 62 N. W. 566, 104 Mich. 468 (1895) 16

Proctor v. United States, 404 F. 2d 819 19

Raffel v. United States, 271 U. S. 494, 70 L. ed. 1054, 46 S. Ct. 566 .....21, 22

PAGE

Reagan v. United States, 157 U. S. 301, 305, 39 L. ed. 709, 710-711, 15 S. Ct. 610, 611 (1894) 17

Serrano v. State, 447 P. 2d 497, 84 Nev. 678 14

Silverthorne Lumber Company v. United States, 251 U. S. 385, 392, 64 L. ed. 319, 321, 40 S. Ct. 182 .. 13

Simmons v. United States, 390 U. S. 377, 19 L. ed. 2d 1247, 88 S. Ct. 967 21

Sharp v. United States, 410 F. 2d 969 22

State v. Brewton, 422 P. 2d 581, 247 Ore. 241 20

State v. Broadbent, 71 P. 1, 27 Mont. 342 17

State v. Butler, 34 P. 2d 1100 17

State v. Butler, 249 N. E. 2d 818, 19 Ohio St. 2d 55 .. 14

State v. Carson, 126 S. E. 755, 131 So. C. 331 (1925) 18

State v. Clinton, 29 A. R. 506, 67 Mo. 380 (1878) ... 16

State v. Hagen, 65 S. W. 249, 254, 164 Mo. 654 17

State v. Hayes, 439 P. 2d 978, 73 Wash. 2d 568 14

State v. Hoffman, 220 N. W. 615, 53 S. D. 182 (1928) 18

State v. Jackson, 443 P. 2d 279, 201 Kan. 795, cert. denied 394 U. S. 908 1

State v. Kimbrough, 262 A. 2d 232, 109 N. J. Super 57 1

State v. Lewis, 43 Pac. 265, 56 Kan. 374 (1896) 1

State v. McClung, 404 P. 2d 460, 66 Wash. 2d 654 .. 1

State v. Smith, 446 P. 2d 571, 74 Wash. 2d 744 1

State v. Turnbow, 354 P. 2d 533, 67 N. M. 241 1

Stewart v. United States, 366 U. S. 1, 6 L. ed. 2d 84, 81 S. Ct. 941 .....

PAGE

Stovall v. Denno, 388 U. S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967 11

Terry v. Ohio, 392 U. S. 1, 20 L. ed. 2d 889, 88 S. Ct. 1868 20

Thaniel v. Commonwealth, 11 S. E. 259, 132 Va. 215 17

Thomas v. State, 2 N. E. 803, 103 Ind. 419 (1885) .. 16

United States v. Fox, 403 F. 2d 97 19

United States v. Jeffers, 342 U. S. 48 35

United States ex rel. Hill v. Pinto, 394 F. 2d 470 .. 19

United States v. Spinelli, 393 U. S. 410, 21 L. ed. 2d 637, 89 S. Ct. 584 23

Walder v. United States, 347 U. S. 62, 98 L. ed. 503, 74 S. Ct. 354 .....14, 18, 19, 20, 21, 27, 28, 29, 30, 35

Wolfson v. United States, 101 F. 430, 435 (5th Circuit, 1900), cert. denied 180 U. S. 637, 45 L. ed. 710, 21 S. Ct. 919 15

Yanke v. State, 8 N. W. 276, 51 Wis. 464 (1881) 16

STATUTES

28 U.S.C.A. § 632 16

New York Code of Criminal Procedure, § 813-f-g-h ..33, 34

AUTHORITIES

Wigmore on Evidence, V. III, § 821, p. 242, n. 3 17

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RESPONDENT'S BRIEF

Statement

This is a writ of certiorari granted by the Court by its order of June 1, 1970, which is directed to the New York Court of Appeals to review its judgment and order made and entered on July 2, 1969, which affirmed an order of the New York Supreme Court, Appellate Division, Second Judicial Department, made and entered on February 17, 1969, which affirmed by a divided court a judgment of conviction imposed upon the petitioner on December 20, 1966, in the County Court of Westchester County, Honorable

Robert E. Dempsey, J., and a jury whereby he was convicted of the crime of Feloniously Selling A Narcotic Drug. The jury was unable to agree as to a second count in the indictment by which he was charged with the commission of the same crime on a different date. Upon such conviction he was sentenced to a term of imprisonment of from six to eight years. On July 22, 1970, he was released on parole.

Facts

By arrangement with Commissioner Edward Carey of the New Rochelle, New York, Police Department, himself the retired head of the New York City Police Department Narcotics Bureau, two New York City narcotics detectives on December 6, 1965, began an investigation into the distribution of narcotics in New Rochelle (88-90 R[1]). The two detectives, George Bermudez, who adopted the cover name of Joe Vegas or Joe V., and Richard Parks, who was known as Eddie Que (90, 317 R), moved into an inexpensive rooming house upstairs from the Four Hundred Club at 400 North Avenue in New Rochelle (203, 234 R). From that point of vantage, they infiltrated this small group of dealers in and users of narcotics who inhabited that area. Among others with whom they became friendly was this petitioner, Viven Harris (91, 204-205 R).

On January 4, 1966, at about 5:30 P.M., the two detectives entered the Three Fours Bar and Grill at 444 North Avenue, New Rochelle (92 R). Approximately at 6:30 P.M. the petitioner walked in and joined the policemen and a couple of fellows they were talking to (92, 319 R). He asked one of the four, Charlie, if Charlie was interested in buying a guitar. Charlie declined, but Detective Bermudez

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[1] Numbers followed by an R have reference to the original typed minutes of the proceedings before the County Court of Westchester County.

expressed some interest, so petitioner offered it to him for thirty-five dollars (92 R). Bermudez sent Parks with the petitioner to see if the guitar was worth that price, and the two left (92, 319 R). Parks went with Harris to the latter's house, examined the guitar and returned to the vicinity of the Three Fours (319 R) where the two detectives once again joined forces (93, 319 R). Parks reported that the guitar was worth twenty-five dollars and Bermudez asked the petitioner to wait a few minutes for him, that he'd like to see the guitar himself. The petitioner said he couldn't because he had to go downtown to "score half a load," which the detective translated as meaning to buy or otherwise secure fifteen decks of heroin (93-94 R).

The detectives returned to the Three Fours at about 7:10 P.M. and the petitioner got back about an hour later. Bermudez feigned anger at Harris for being so late, and Harris said, "I told you I had to go downtown to get a couple of half-loads" (95 R). They began to talk about the guitar and finally the two men, petitioner and Bermudez, left the bar and drove to the petitioner's house. En route, Bermudez said, "What's happening?" to which Harris replied, "What do you want?" Bermudez told him he'd take a half-load (95 R). This exchange, the detective testified, was narcotics jargon for, "Do you have any narcotics?" and "Yes, how much do you want?" The petitioner balked at selling that much because he had just started distributing narcotics again and he had a partner who would have to approve so large a sale. He offered Bermudez a single bag, however (96 R).

The two men then went up to the petitioner's apartment where Bermudez looked at the guitar and offered petitioner twenty-five dollars for it. For a while he held out for thirty-five, but he finally accepted the lesser sum, and Bermudez gave him thirty-dollars, a twenty and a ten. He pocketed the money and made no effort to give Bermudez any change (97 R). They went to a nearby poolroom to see Al, the petitioner's partner. Bermudez of-

fered thirty dollars for the half-load of fifteen decks, and Al insisted on thirty-five. They dickered for a few minutes, but neither would budge, so Al went back into the poolroom. On the way back to the car, the petitioner offered Bermudez a single bag for seven dollars, but when Bermudez flatly refused to pay more than five he accepted it, and they returned to the petitioner's house. He went upstairs while the detective waited in the car, and in a few minutes came back down and handed Bermudez a glassine envelope which contained a white powder. Bermudez didn't pay him for it because he had five dollars change coming to him from the guitar transaction (98-100 R). This powder was later identified by a police chemist as heroin (279-282 R).

The detectives next encountered the petitioner on January 6, 1966, at about 8:25 P.M., again at the Three Fours Bar (117-118, 323 R). The petitioner asked Bermudez if he had any heroin, and Bermudez told him that he didn't and in the course of the ensuing conversation the petitioner asked if he wanted any. Bermudez said he wanted two bags, but the petitioner warned him the price was up to seven dollars a bag. After a little bit of haggling they agreed on six dollars a bag, and with that the petitioner left the bar (118-119 R). The detective remained at the bar for twenty to thirty minutes, and when the petitioner came back he asked Bermudez to walk outside with him. Again the two men left the bar and in Bermudez' car he handed over the two bags of white powder, and the detective paid him the twelve dollars (120-121 R).

Apparently the petitioner was impressed with the way Bermudez handled himself, because he told him that he, the petitioner, was one of a four man partnership, all of whom he named, who were selling heroin in Yonkers and New Rochelle, in New York, and in Connecticut, and he offered Bermudez the New Jersey franchise, in a manner of speaking. Bermudez turned him down cold on the pre-

text that he was opening his own business the following week and could beat the petitioner's prices. The petitioner responded, "Maybe I can do something for you if you want to go into action for me. I'll let you have half-loads at twenty-two dollars a half" (121 R). The two bags of white powder for which the detective paid twelve dollars were also identified by a police chemist as heroin (285-288 R).

In his own defense, the petitioner called one Luther Harris who, about a month before, had pleaded guilty to attempted possession of a narcotic drug in satisfaction of an indictment by which he was charged with the felonious sale of heroin, which indictment arose out of the same Bermudez-Parks investigation. Upon more thoughtful reflection, though, and after consultation with his attorney, he decided not to testify (371-387 R). Incidentally, so far as appears, the petitioner and Luther Harris were not related.

Finally, the petitioner testified in his own behalf. He testified that he first saw Bermudez on the evening of January 4, 1966, in the Three Fours Bar (391 R). They met in a group, and, according to the petitioner, if narcotics was discussed, it was out of his presence (392 R). Some time thereafter, he testified, Bermudez asked him if he could get a bag of heroin for him, but the petitioner told him there was a panic, an acute shortage of drugs, and if they could be gotten the petitioner would be using them himself instead of the Robitussin A. C. cough medicine he was being forced to resort to (394-395 R). He said that about two weeks before that date he and a couple of other fellows had gotten a bag of heroin for Bermudez of which they took a small portion before giving it to him, but he denied having bought anything for him on January 4th (395-399 R).

Petitioner met Bermudez two nights later at the Three Fours and again, according to the petitioner, Bermudez

asked him for heroin. This time he wanted a half-load, and, again, petitioner told him there was a panic on, and drugs simply weren't available. Bermudez moderated his demand and asked if the petitioner could get him two bags, but again he was told there was nothing for sale (400-402 R). At that point Henry Stanley, a friend of the petitioner, injected himself into the conversation. Stanley gave the petitioner a dig in the ribs, called him aside, and suggested they take Bermudez' money and palm off some heroin substitute on him. Petitioner fell in with the plan, and they went to his house, and after fooling around unsuccessfully with powered infant's formula, they hit upon baking powder. This was acceptable since Bermudez had told them he was a "snorter," an addict who sniffed the narcotic into his nostrils, and baking powder had a comparable sting when used in that way. They prepared two glassine envelopes of baking powder and brought them back to Bermudez at the Three Fours. After warning Bermudez that what they had given him was a light dosage due to the panic, they took his twelve dollars and with four more they scraped up between them went to New York City to get heroin for their own use. The petitioner categorically denied that he ever sold Bermudez any drugs (402-410 R).

In the late afternoon or early evening of the following day, January 7, 1966, Bermudez and Parks arrested the petitioner in New Rochelle and brought him immediately to the office of the District Attorney of Westchester County where at 7:10 P. M. he was interrogated by an assistant district attorney. The statement he gave at that point and which the prosecution used to impeach his trial testimony constitutes the heart of this appeal (131-132 R, 72-78).

Argument

The Use to Which the Petitioner's Statement Was Put Was Perfectly Proper.

POINT I

The illegality of the statement.

The petitioner has argued under this Point the "basic illegality of the statement itself" (Petitioner's Brief, p. 7). In his view that basic illegality springs from two sources: the failure of the assistant district attorney to give him the four warnings required by *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. ed. 2d 694, 86 S. Ct. 1602, and his having been interrogated without the presence of counsel. We would prefer to answer these two arguments in inverse order.

The statement began at 7:10 P. M. (A-72) and ended at 7:19 P. M. (A-78), and it takes up ten printed folios. Thus, at folio 5, or midway through the statement, the petitioner, in response to a question, said:

> "Yes, but I'd rather see a lawyer before I keep on." (A-74)

If the interrogation had continued at that point with no acknowledgment by the questioner that the petitioner had a right to consult an attorney, the confession without doubt would be inadmissible by both New York and Federal standards, *People* v. *Noble,* 9 N. Y. 2d 571, 175 N. E. 2d 451; *Columbe* v. *Connecticut,* 367 U. S. 568, 6 L. ed. 2d 1037, 81 S. Ct. 1860. That did not occur, though. The entire character of the interview changed in an instant. Instead of its continuing as a probe for information, it became an exposition of the petitioner's right to have an attorney:

> "Q. That's your privilege. That is your right. You want to call one up now? A. No.

"Q. What? A. No, I'll call tomorrow.
"Q. You will call him tomorrow? A. Yes." (A-74)

This must surely constitute a waiver of the right to counsel, at that point at least, because the standard of *Carnley* v. *Cochran,* 369 U. S. 506, 516, 8 L. ed. 2d 70, 77, 82 S. Ct. 884, reaffirmed in *Miranda* v. *Arizona, supra,* 384 U. S. at 475, 16 L. ed. 2d at 724, was precisely met here. In *Carnley,* the Court said:

> "Presuming waiver from a silent waiver is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer."

The Court will understand, of course, that we are not attempting to indicate that the *Miranda* requirements were adhered to; they were not. What we would ask the Court to note, though, is that the petitioner unmistakably knew of the fact that he had the option of remaining silent if he chose not to answer questions (A-72), he was firmly advised that if he chose to speak, what he said could be used against him (A-73), and in full awareness of his right to consult with an attorney he voluntarily and rationally waived that right (A-74). So much, we submit, for the petitioner's claim that he was questioned in the absence of an attorney.

Moving, then, to the bar to the statement's admissibility presented by *Miranda* v. *Arizona, supra,* we would point out initially that it was taken on January 7, 1966 (A-72), roughly five months before *Miranda* was decided. When it was taken, therefore, in terms of the then applicable law, it was fully admissible. It was only declared to be inadmissible on June 20, 1966, when this Court decided *Johnson* v. *New Jersey,* 384 U. S. 719, L. ed. 2d 882, 86 S. Ct. 1772, and it was deficient in only one respect, that the assistant

district attorney had not advised the petitioner that if he could not afford an attorney, one would be appointed for him. Throughout the entire progress of this case in the New York courts we acknowledged the inadmissibility of this statement because it would have been unrealistic to expect that the State courts would otherwise regard it, inasmuch as to have done so would have placed them in direct conflict with *Miranda* and *Johnson*. In this Court, however, we are no longer prepared to concede its inadmissibility because we finally find ourselves in a forum which can make definitive distinctions between those two cases and this one.

We would first ask the Court to consider the brief dialogue between the petitioner and the assistant district attorney at page 74 of the Appendix which we have quoted, *supra*. From that it is perfectly evident that money was no deterrent to his consulting an attorney because he fully intended to consult with one the following day. As we read *Miranda* v. *Arizona, supra,* the reason for the fourth warning, i.e., the appointment of an attorney for an indigent, appears to be to put him on a plane with the affluent. As the Court put it:

> "Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one." *Miranda* v. *Arizona, supra,* 384 U. S. at 473, 16 L. ed. 2d 723.

The unstated corollary, of course, is that an indigent, feeling that paying a lawyer would be out of the question, would "waive" the services of an attorney if he did not know he could have one free. Clearly, however, this was not the petitioner's situation. Whether it be thought that he had an attorney—and the use of the word "him," rather than "one" suggests that likelihood—or that he had the resources to retain a lawyer, it is plain that he felt no

financial restraint on his getting legal advice. Manifestly, no fourth warning was required as to him because he was operating under no such misapprehension as the Court was guarding against in mandating it in the usual case.

Simultaneously, we would ask the Court to re-evaluate *Johnson* v. *New Jersey, supra.* As the Court knows, that case made all confessions which did not conform to the *Miranda* requirements inadmissible at trials which began after June 13, 1966. In *Johnson,* the Court discussed the reasons why *Miranda* should have only prospective effect and pointed out:

> "Nor would retroactive application have the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed. We have pointed out above that past decisions treated the failure to warn accused persons of their rights, or the failure to grant them access to outside assistance, as factors tending to prove the involuntariness of the resulting confessions. See, Haynes v. Washington, supra; Spano v. New York, supra. Prior to Escobedo and Miranda, however, we had expressly declined to condemn an entire process of in-custody interrogation solely because of such conduct by the police. See Crooker v. California, 357 U. S. 433, 2 L. ed. 2d 1448, 78 S. Ct. 1287 (1958); Cicenia v. Lagay, 357 U. S. 504, 2 L. ed. 2d 1523, 78 S. Ct. 1297 (1958). Law enforcement agencies fairly relied on these prior cases, now no longer binding, in obtaining incriminating statements during the intervening years preceding Escobedo and Miranda." *Johnson* v. *New Jersey, supra,* 384 U. S. at 731, 16 L. ed. 2d at 891.

The Court concluded therefrom:

> "Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the volun-

tariness test." *Johnson* v. *New Jersey, supra,* 384 U. S. at 732, 16 L. ed. 2d 892.

However, what the Court may have overlooked were the cases of *present* defendants, those from whom confessions were taken before *Miranda* was announced and who came to trial after *Miranda.* The Court, discussing the new *Miranda* rule, said:

> "Law enforcement officers and trial courts will have fair notice that statements *taken* in violation of these standards may not be used against an accused." *Johnson* v. *New Jersey, supra,* 384 U. S. 732, 16 L. ed. 2d 892; Emphasis added.

But as to those whom we have called present defendants, law enforcement officers did not have fair notice of the new standards, but they were nevertheless being held to them. They had fair notice that they should *take* no more such statements, but, regrettably, no provision was made by the Court for the use of statements taken by law enforcement officers in good faith prior to *Miranda* and in full conformity with the law on which the Court concluded they had fairly relied, in cases which had not yet come to trial.

Since *Johnson,* the Court has decided *Stovall* v. *Denno,* 388 U. S. 293, 18 L. ed. 2d 1199, 87 S. Ct. 1967, and *Desist* v. *United States,* 394 U. S. 244, 22 L. ed. 2d 248, 89 S. Ct. 1030, and in each of these has established as the cut-off date the date the prohibited conduct was done. If *Johnson* had adopted the same standard, which the Court has since suggested may be a better one, *Jenkins* v. *Delaware,* 395 U. S. 213, 219 n. 7, 23 L. ed. 2d 253, 259, 89 S. Ct. 1677, 1680, then this present statement would have retained its initial validity, and there would be no need to inquire into the use to which it might properly have been put.

POINT II

No illegal evidence was admitted into evidence in this case.

The petitioner is arguing here that the statement he gave the police was inadmissible into evidence. With that statement, at least in the conformation of this appeal, we cannot disagree. What the Court must bear in mind, however, is that the statement was not truly admitted into evidence.[2] It may be that our confusion about the petitioner's argument here—and we do admit to a certain amount of confusion—arises from his attempt to couple and to make logical contradictories out of illegal and irrelevant evidence. It is submitted that this cannot be done, if only for the reason that a given piece of evidence might be both or it might be neither.

If *Burgett* v. *Texas*, 389 U. S. 109, L. ed. 2d 319, 88 S. Ct. 258, upon which the petitioner relies be examined, it will be found to add no weight at all to his argument. The first and most obvious distinction to be made between this case and *Burgett* is that in the latter the prosecution introduced the tainted matter as a part of its direct case. That factor alone puts this case beyond the scope of *Burgett's* precedential authority because here the prosecution scrupulously avoided any reference to the petitioner's confession on its direct case. The second point of distinction is that the prior conviction in *Burgett* was an indispensable element of the State's case, because in Texas, apparently, the trial of the substantive case is not bifurcated from the punishment aspect of the case. The confession in this prosecution was by no means a necessary part of the case.

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[2] It was in a highly technical sense admitted into evidence, but solely for the purpose of securing its identity in the record for the appellate courts. See Petitioner's Brief, fn. 1, p. 5.

Neither does *Massiah* v. *United States*, 377 U. S. 201, 12 L. ed. 2d 246, 84 S. Ct. 1199, assist the petitioner, because there too the illegal evidence was admitted as part of the Government's direct case. Here that just didn't happen.

The oft-used quotation from *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, 392, 64 L. ed. 319, 321, 40 S. Ct. 182:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all."

is singularly inappropriate in this context. It applies, of course, to what later became well known as the Fruit of the Poisonous Tree Doctrine. In other words, a law enforcement officer may not resort to illegal methods of securing evidence against a defendant which thereafter will be utilized to secure his conviction. The proscription, though, outlaws as well the use of the secondary evidence on the prosecutor's direct case, and that is the force of the quotation. As we have pointed out, that didn't happen here.

Thus it is with all of the petitioner's cases with the exception of *Commonwealth* v. *Burkett*, 211 Pa. Super. 299, 235 A. 2d 161; and *People* v. *Marsh*, 14 Mich. App. 518, 165 N. W. 2d 853. The latter are in point, and we will discuss them at Point III, *infra*, but all of his Federal cases deal with evidence introduced on the prosecution's direct case and hence are inapposite here.

POINT III

The petitioner's confession was properly used to impeach his direct testimony.

The Court is here called upon to decide whether *Walder* v. *United States*, 347 U. S. 62, 98 L. ed. 503, 74 S. Ct. 354, is or is not good law and whether or not it is worthy of perpetuation. In support of his assertion that it is not, the petitioner has cited no fewer than sixteen jurisdictions in which various courts throughout the country have come to the conclusion that it is not. Theirs is, however, not the only evaluation of the question which can be made, because eight States have arrived at a precisely opposite assessment:

People v. *La Batt*, 246 N. E. 2d 845, 108 Ill. A. 2d 18;
State v. *Jackson*, 443 P. 2d 279, 201 Kan. 795, cert. denied 394 U. S. 908;
May v. *State*, 211 So. 2d 845 (Mississippi, 1968);
Serrano v. *State*, 447 P. 2d 497, 84 Nev. 678;
State v. *Kimbrough*, 262 A. 2d 232, 109 N. J. Super. 57;
People v. *Boodie*, 257 A. 2d 657, 26 N. Y. 2d 779;
State v. *Butler*, 249 N. E. 2d 818, 19 Ohio St. 2d 55;
State v. *McClung*, 404 P. 2d 460, 66 Wash. 2d 654;
State v. *Hayes*, 439 P. 2d 978, 73 Wash. 2d 568;
State v. *Smith*, 446 P. 2d 571, 74 Wash. 2d 744.

The question presented by this case, though, cannot be resolved in the coldly statistical way a sports contest, for example, is, with the winner being decided by the number of tallies he has made. Consequently, even if sixteen to eight will win a baseball game, it should not prevail here.

This problem, it is submitted, is best explored by going back to the old common law and tracing the evolution

through the years of the whole concept of the defendant as a witness. At common law, of course, he was absolutely precluded from testifying, *Wolfson* v. *United States,* 101 F. 430, 435 (5th Circuit, 1900), cert. denied 180 U. S. 637, 45 L. Ed. 710, 21 S. Ct. 919. In New York State in 1869, however, this impediment was removed, and for the first time an accused was permitted, if he so chose, to be a witness in his own case, Laws of New York of 1869, Ch. 678. In the following year of 1870, the New York Court of Appeals was called upon for the first time to interpret the new law, and it held:

> "The defendant, however, appeared before the court below in a double capacity, that of an accused party on trial, and that of a witness. As an accused party on trial, she was entitled to the application of the rule, that her character could not be attacked, unless she herself opened the question. She had the benefit of it, as the district attorney opened and closed his case without allusion to her character. She however chose to avail herself of the statute of 1869, which permitted her to make herself a 'competent witness' in the case. She was not compelled to take this position, the statute declaring that the failure to testify should not create any presumption against her. (Stat. *supra.*) She elected, however, to make herself a witness. She became and was a competent witness. For this purpose, she left her position as a defendant, and while upon the stand, was subject to the same rules, and called upon to submit to the same tests which could by law be applied to other witnesses. Her statements were made to the jury under the solemnity of an oath. In theory of law, this gave greater weight to her narration than if she had placed her simple declaration before the jury, unaccompanied by her oath. She cannot claim the advantages of the position of a witness, and at the same time avoid its duties and responsibilities." *Brandon* v. *People,* 42 N. Y. 265, 267-268.

Although not necessarily in response to either the New York statute or the *Brandon* decision, a number of other States arrived at identical assessments of the role of the accused as a witness:

> *Thomas* v. *State*, 2 N. E. 803, 103 Ind. 419 (1885);
> *State* v. *Lewis*, 43 Pac. 265, 56 Kan. 374 (1896);
> *Commonwealth* v. *Nichols*, 19 A. R. 346, 114 Mass. 285 (1873);
> *People* v. *Sutherland*, 62 N. W. 566, 104 Mich. 468 (1895);
> *State* v. *Clinton*, 29 A. R. 506, 67 Mo. 380 (1878);
> *Yanke* v. *State*, 8 N. W. 276, 51 Wis. 464 (1881).

In 1878 the Congress enacted a statute substantially similar to that of New York, 28 U.S.C.A. § 632, and the Federal courts joined the growing number of jurisdictions which abandoned the common law prohibition against the defendant's testifying. The keystone of all these cases was that if a defendant chose to testify he waived his right against self-incrimination and, as a witness, became completely indistinguishable from every other witness as to the scope within which he could be cross-examined. As this Court put it:

> "On the other hand, if he avail himself of this privilege, his credibility may be impeached, his testimony may be assailed, and is to be weighed as that of any other witness. Assuming the position of a witness, he is entitled to all its rights and protections, and is subject to all its criticisms and burdens. It is unnecessary to consider whether, when offering himself as a witness as to one matter, he may, either, at the will of the government or under the discretion of the court, be called upon to testify as to other matters. That question is not involved in this case, and we notice it simply to exclude it from the scope of our observations. The privileges and limitations to which we refer are those which inhere in the witness as a witness, and which affect the testimony voluntarily given. As

to that he may be fully cross-examined. It may be assailed by contradictory testimony. His credibility may be impeached, and by the same methods as are pursued in the case of any other witness." *Reagan* v. *United States,* 157 U. S. 301, 305, 39 L. ed. 709, 710-711, 15 S. Ct. 610, 611 (1894).

In view of the very widely held impression that an accused was subject to impeachment to the same extent as was any other witness, there is nothing at all surprising in finding that statements by an accused which on the prosecutor's direct case would have been inadmissible were nonetheless perfectly proper vehicles for attacking his credibility as a witness, *Commonwealth* v. *Tolliver,* 119 Mass. 312; *State* v. *Hagen,* 65 S. W. 249, 254, 164 Mo. 654; *State* v. *Broadbent,* 71 P. 1, 27 Mont. 342; *State* v. *Butler,* 34 P. 2d 1100; *Harrold* v. *Territory,* 89 P. 202, 18 Okla. 395; *Thaniel* v. *Commonwealth,* 11 S. E. 259, 132 Va. 215. See also, Wigmore on Evidence, V. III, § 821, p. 242, n. 3.

The first significant departure from this entirely consistent rule—and it was not really a departure at all—came in 1909 with the reversal of *Harrold* v. *Territory, supra,* by the United States Circuit Court of Appeals for the Eighth Circuit, *Harrold* v. *Territory,* 169 F. 47. There the Court distinguished between a confession which was voluntary in the traditional sense and one which was not. The Court held:

> "First, a confession by the accused of his guilt or of facts tending to establish it, obtained by the compulsion or inspiration of hope, fear or any other sort of inducement, is incompetent against him because it is not worthy of belief." *Harrold* v. *Territory, supra,* 169 F. at 48,

and continued:

> "The reason for the first rule is that confessions induced by hope or fear inspired by promises, threats

> or surrounding circumstances are likely to be untrue, are unreliable, incredible, and, therefore, not evidence of the truth." *Harrold* v. *Territory, supra,* 169 F. at 49.

It was a reasonable distinction, and it was quickly adopted by a substantial number of jurisdictions. See, for example, *Crawford* v. *State,* 70 So. 374, 70 Fla. 335 (1915); *Cross* v. *State,* 221 S. W. 489, 142 Tenn. 510 (1920); *State* v. *Carson,* 126 S. E. 755, 131 So. C. 331 (1925); *State* v. *Hoffman,* 220 N. W. 615, 53 S. D. 182 (1928). It remained a tangible, workable point of distinction up until May, 1966, *Commonwealth* v. *Kleciak,* 216 N. E. 2d 417, 350 Mass. 679, although we do not suggest that it was a uniformly followed rule; see, for example, *State* v. *Turnbow,* 354 P. 2d 533, 67 N. M. 241.

However, in this context, *Walder* v. *United States, supra,* was almost predictable, because if, as a great many courts believed, a voluntary statement, even though inadmissible, was reliable, so were the *Walder* 1950 narcotics unimpeachable evidence of their possession, although they too were inadmissible. Consequently, the use of each as a source of impeachment of the defendant's direct testimony was perfectly permissible.

Immediately following the Massachusetts ruling in *Commonwealth* v. *Kleciak, supra,* this Court decided *Miranda* v. *Arizona, supra.* In that case, the Court said:

> "If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective

waiver required for any other statement." *Miranda* v. *Arizona, supra,* 384 U. S. at 477, 16 L. ed. 2d at 725.

This reference by the Court to impeachment by means of a statement persuaded some courts that this Court had abandoned its *Walder* position and was saying that impeachment could be accomplished only by a statement which conformed to the *Miranda* standards. See, for example, *Proctor* v. *United States,* 404 F. 2d 819; *Groshart* v. *United States,* 392 F. 2d 172; *United States ex rel. Hill* v. *Pinto,* 394 F. 2d 470; *United States* v. *Fox,* 403 F. 2d 97. This broad a reading of *Miranda* is not necessary, though, because that case deals not with voluntariness per se but with admissibility. This is demonstrated by the opening paragraph of the decision which characterizes the whole decision:

> "The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, *we deal with the admissibility of statements* obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself." *Miranda* v. *Arizona, supra,* 384 U. S. at 439, 16 L. ed. 2d at 704. (Emphasis added.)

Furthermore, the Court's statement referring to the *Miranda* ruling:

> "Future defendants will benefit fully from our new standards governing in-custody interrogation, while past defendants may still avail themselves of the voluntariness test." *Johnson* v. *New Jersey, supra,* 384 U. S. at 732, 16 L. ed. 2d at 892.

surely permits the inference, by the Court's having distinguished between them, that the *Miranda* standard tests only admissibility and not voluntariness. It was this fundamental question which so closely divided the Oregon Supreme Court in *State* v. *Brewton*, 422 P. 2d 581, 247 Ore. 241, with three judges willing to allow the use for impeachment of an inadmissible statement simply on the premise that it was voluntarily given. If *Miranda* is deemed to refer solely to admissibility, then it is completely consistent with *Walder*. If, for example, a defendant gives two exculpatory statements to police officers which are wholly at variance each with the other, they would be relevant and competent evidence on the prosecution's direct case. However, to be admissible they would first have to pass the *Miranda* test, and if they did not they would not be admitted. That is the *Miranda* ruling. However, if the defendant thereafter chose to testify, there seems no purpose in prohibiting the prosecutor's questioning him by the use of the statements, because, like any witness, he was impeachable by the use of prior inconsistent statements so long as they were voluntary and thus, to paraphrase *Harrold:*

> true, reliable, credible and, therefore, evidence of the truth.

Admissibility would no longer be the key; they would not be being admitted, and whether or not they were voluntary would then be the only question.

What must be remembered here is that:

> "Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry* v. *Ohio*, 392 U. S. 1, 12, 20 L. Ed. 2d 889, 900, 88 S. Ct. 1868, 1875.

Presumably the same rationale applies to violations of the Fifth Amendment rights, and, while it is not difficult

to envision a police officer calculatedly conducting an illegal search, it is virtually impossible to conceive of his going after an illegal confession which at the same time would retain its voluntary character. Differently stated, the average working police officer is not looking for material to impeach the credibility of his prisoner for possible use in the statistically small likelihood of that man's going to trial and testifying in his defense. Therefore, police misconduct is not going to be deterred by the abandonment of the *Walder* doctrine, thus frustrating one of the cardinal purposes of suppression in the first instance.

If, and there doesn't seem to be any room to argue about it, the guarantee of the Fifth Amendment of the United States Constitution is that a defendant in a criminal case may never be compelled to incriminate himself, then that guarantee is secured by the Court's affirmance of this case and those decided by its principle. Once the statement is declared to be inadmissible it is no longer any evidence at all of the truth or falsity of what it contains and hence is not in any sense incriminatory. It may not be used in any way to show guilt, because its use is solely to impeach credibility. Consequently the guarantee of the Fifth Amendment is fully preserved. However, it is quite a different matter to insist that the Fifth Amendment guarantees that a criminal defendant may with complete impunity lie.

The petitioner argues that the underlying thesis of *Walder* has been overruled in that testimony given by a defendant in attempting to secure a Constitutional right may not be used against him, *Simmons* v. *United States,* 390 U. S. 377, 19 L. ed. 2d 1247, 88 S. Ct. 967. Our first reaction to that assertion is to point out that in *Simmons* the Garrett testimony was admitted into evidence. Since *Miranda* says the same thing, it is difficult to conclude that one has any greater effect on *Walder* than the other. Our second reaction is to cite the well known case of *Raffel* v. *United States,* 271 U. S. 494, 70 L. ed. 1054, 46 S. Ct. 566. In that situation a prohibition agent testified that after he

had searched a drinking place the defendant had admitted owning it. The defendant did not testify and the jury failed to reach a verdict. At the second trial, the same agent gave the same testimony, only this time Raffel took the stand and denied the admission. On cross-examination, he was asked why he had not testified at the first trial, and the trial court overruled his objection and required him to answer. This Court affirmed, holding:

> "The safeguards against self-incrimination are for the benefit of those who do not wish to become witnesses in their own behalf and not for those who do. There is a sound policy in requiring the accused who offers himself as a witness to do so without reservation, as does any other witness. We can discern nothing in the policy of the law against self-incrimination which would require the extension of immunity to any trial or to any tribunal other than that in which the defendant preserves it by refusing to testify."

Raffel v. *United States, supra,* 271 U. S. at 499.

Raffel has, as far as we can determine, remained the law right up to the present, having been relied upon by this Court in 1957, despite a strong dissent which would have overruled it, *Grunewald* v. *United States,* 353 U. S. 391, 1 L. ed. 2d 931, 77 S. Ct. 963, and again in 1961, although distinguished by the Court from the facts of that case, *Stewart* v. *United States,* 366 U. S. 1, 6 L. ed. 2d 84, 81 S. Ct. 941. Unexpectedly, it is even endorsed by the Fifth Circuit, *Sharp* v. *United States,* 410 F. 2d 969, which somehow nonetheless questions the continued efficacy of *Walder, Breedlove* v. *Beto,* 404 F. 2d 1019, 1022-1023.

The petitioner has gone to some pains to indicate what in his judgment will be the result of this Court's affirmance of this case, and it might be well if the respondent were to address itself to these complaints.

(A) The respondent argues that the ruling appealed from provides ever widening avenues down which the police may proceed to secure unconstitutional evidence. What he seems to have overlooked is that unconstitutional evidence, because it is unconstitutional evidence, may never be *admitted* as evidence, either directly or as a source of impeachment. Furthermore, as we have pointed out, police officers don't want and do not seek to acquire involuntary confessions because by definition they are useless for any purpose. Furthermore, our own experience, and we venture to suggest that it is also the Court's, indicates that where the product of searches and interrogations has been found wanting, it has not been because the police have sought means of circumventing the mandates of this Court and been caught at it. Rather, in the overwhelming majority of cases, the deficiency in the conduct of the police has been occasioned by a sincere, albeit unsuccessful, attempt to follow those mandates. *United States v. Spinelli*, 393 U. S. 410, 21 L. ed. 2d 637, 89 S. Ct. 584, is an ideal case in point. One gets the distinct impression from *Spinelli* that the F. B. I. had him under constant surveillance and only gave it up when they were sure they had complied with all of the appropriate requirements. To conclude that the police are in search of sophisticated ways of violating this Court's directives is both unfair and unwarranted.

(B) The petitioner next complains that this ruling of the Court of Appeals leaves no way of vindicating the violation of his constitutional rights. In what way, we would reply, was the violation of Sam Walder's rights vindicated?

(C) The petitioner also argues that the Court of Appeals has required him improperly to choose between his right to testify and his right not to incriminate himself. This is an adroit way of saying that he has an inalienable right to lie under oath. Over two hundred years ago Soli-

citor General Murray in *Omychund* v. *Barker*, 1 Atk. 21, 34, gave what we submit is a highly discerning assessment of any such right. He said:

> "No country can subsist a twelvemonth where an oath is not thought binding, for the want of it must necessarily dissolve society."

In a slightly different context, the Supreme Court of Errors of the State of Connecticut said in *Curtiss* v. *Strong*, 4 Day 51, 56 (1809):

> "There can be no doubt but that the law intended, that the fear of offending God should have its influence upon a witness to induce him to speak the truth. But no such influence can be expected from the man who disregards an oath. He is, therefore, excluded from being a witness."

In sum, a defendant has no more right to lie than has any other witness. The respondent is not so naive as to assume that defendants take the stand and uniformly tell the truth, but to keep faith with the sanctity of the oath they must surely be impeachable in every reasonable way if they defy the obligation the oath puts upon them to tell the truth. It seems to us that the petitioner is in an odd position here. If he takes the witness stand to the tell the truth—or even a lie which is consistent with the prior statement—then he has no reason to fear impeachment. If, on the other hand, he takes the stand to lie, then perhaps the wisdom of the common law was superior to ours: perhaps a criminal defendant is, as a witness, unworthy of belief in the first instance, and he should be prohibited from testifying at all.

(D) Next the petitioner argues that permitting the prosecutor to use the inadmissible statement only to impeach sidesteps this Court's ruling in *Jackson* v. *Denno*, 378 U. S. 368, 12 L. ed. 2d 908, 84 S. Ct. 1774. That, how-

ever, is not a valid objection because voluntariness may be explored out of the presence of the jury at any time, probably when the statement is first referred to for impeachment purposes. If the question of voluntariness is decided adversely to the prosecutor, he may not use the statement to impeach, that's all, so such a procedure does not, as the petitioner argues, "avoid a possible adverse determination" (Petitioner's Brief, p. 17). Nor should it come as any great surprise to the defendant, or his attorney either, for that matter, that the district attorney has his confession, admissible or otherwise. Who better than he should know if he has confessed?

(E) The petitioner suggests that this procedure is unrealistic in the same sense as the procedure condemned by *Bruton* v. *United States*, 391 U. S. 123, 20 L. ed. 2d 476, 88 S. Ct. 1620. This is not the same thing as *Bruton* at all. In *Bruton*, one defendant was condemned out of the mouth of his co-defendant, and this Court simply held that in such a situation they should not be tried together. Here the jury is just being cautioned that the defendant-witness has not always told the same story and that they are permitted to know that, not so they may choose which of the two versions they believe, but so that they may decide whether or not they believe what he has testified to. The net effect in practice is that if the jury disbelieves his testimony, they are going to convict him in all likelihood. That is the value to the prosecution of the exculpatory, though contradictory, statement. The jury is not being asked to select one theory of acquittal over another; they are being asked if they can believe this defendant *at all*, no matter what he says. It is nothing but the *falsus in uno, falsus in omnibus* doctrine, and bears no relationship to *Bruton* whatsoever.

The petitioner makes an interesting argument as to why the County Court charged the jury on the question of agency. It is his thought that the Court could not put out of its mind—and therefore logically neither could the jury

—the substantive evidence of the impeaching statement. It is, as we say, an interesting argument, but it is inaccurate. Right about that time or shortly before, the Appellate Division, Second Department, of the New York Supreme Court decided *People* v. *Miller*, 24 A. D. 2d 1023, 267 N.Y.S. 2d 170. Although there was not a scrap of evidence in that case which would tend to establish an agency relationship between the defendant and the undercover police officer, the defense requested an agency charge to the jury. The Court declined to give it, and the Appellate Division held that refusal to have been error. From that point on in all undercover narcotics cases the County Court of Westchester County and all its judges routinely, and even in the absence of a request, included the agency relationship in the charge to the jury whether it appeared to be called for or not. That it did so in this case had nothing to do with the impeaching statement, for it was done in every case. More than that, though, there is substantial authority in New York that the Court is required to charge any defense which might be demonstrable from the prosecutions's case, *People* v. *Steele*, 26 N. Y. 2d 529, and surely an agency relationship might have been found to exist between Bermudez and the petitioner. In consequence he was entitled to have the Court give the jury that instruction.

(F) The petitioner argues that the adoption of the rule we urge would create an imbalance as between the experienced criminal and the neophyte. Certainly it would; we don't argue that. So, however, does *Miranda* v. *Arizona*, *supra*, and the insulation provided in each case is the same: inadmissibility of the resultant statement.

(G) The petitioner then argues that this rule would put State courts in the position of violating rather than enforcing constitutional rights. With that we cannot agree because it makes an assumption we do not accept; that this Court is going to stamp this procedure illegal. The

State courts will be protecting the defendant's constitutional rights when they have ruled any such statement as we are here discussing inadmissible as evidence. He has a constitutional right not to have an inadmissible statement considered on the question of his guilt, but he has no right to use it as a shield for perjury. Inasmuch as the dominant theme of the *Walder* case was perjury and because perjury looms so large in this case there is attached hereto as Appendix "A" the complete transcript of the colloquy between the petitioner's attorney and the Court taken from the sentencing minutes on December 20, 1966, where the nature and extent of the petitioner's attempts to lie to the Court are discussed at length.

(H) Then the petitioner makes a sort of an amorphous argument that this rule creates "a haphazard and unequal application" of certain rules of law. That we contest vigorously. Either a thing may be done or it may not. In this specific context either the inadmissible statement may be used to impeach or it may not. There is nothing haphazard or unequal about that. It is a rule of law like every other rule of law.

(I) The petitioner complains that the application of the Harris rule tends to suggest that the defendant either lied when he gave the statement or lied when he testified. *That is precisely the point!* That is its sole function. When the prior statement is adverted to, it is being used to impeach his credibility. But, the petitioner says, you can't determine constitutionality by that means. What he forgets is that we are no longer trying to prove constitutionality. If constitutionality were the criterion, the statement would be permissible for *every* purpose, not just impeachment. To get to the question presented here, one must presume that *Miranda* has been violated and go on from there.

(J) The petitioner makes further reference to *Burgett* v. *Texas, supra,* where the prosecutor made reference to an

unconstitutionally secured prior conviction. As we pointed out (Point II, *supra*), the conviction was an indispensable part of the prosecution's direct case, and it was admitted into evidence on that direct case as a part of the substantive proof. In the analogous situation concerning an inadmissible statement, the *Miranda* rule accomplishes the *Burgett* result, and, as we have argued throughout, the statement used only for impeachment violates neither of those cases.

(K) The petitioner finally points out that the question of voluntariness was never submitted to the jury. Clearly this was not possible because there is absolutely no way a jury can assess the voluntariness of a statement the whole of which they have never seen. As a matter of fact, what the jury did hear in this case omitted entirely any of the elements by which they could have found it voluntary. For example, they were never told that the petitioner was advised of his right to remain silent, they were never told that he was warned that what he said could be used against him, and they were never informed that he was given an opportunity to phone a lawyer (Compare, pp. 57-65 with pp. 72-74). In short, this jury was incapable, as any jury would be incapable, of making an informed determination that such a statement was or was not voluntary. It must necessarily follow that a different rule applies to the impeaching statement than does to the admissible statement.

Despite the many objections voiced by the petitioner about the propriety of permitting the prosecutor to cross-examine him by the use of his prior inadmissible statement, it is submitted that he has suggested to the Court no reason why its ruling in *Walder* v. *United States, supra*, was illegal, improvident or essentially wrong, and in consequence has provided the Court with no ground for reversing *Walder*.

POINT IV

The use to which the petitioner's statement was put was in no way prejudicial.

The petitioner's claim here is that too much of the statement was quoted from in the jury's presence and that much of it was not collateral. The first claim, it is submitted, is specious. As we count them, the prosecutor asked him if he remembered being asked and giving answers to thirty nine questions (57-65). The statement itself, however, contains ninety eight questions and answers (72-78), and that, it is submitted, effectively lays to rest the petitioner's assertion that his prior statement "was used virtually in toto" (Petitioner's Brief, p. 19). More than that, though, to the prosecutor's question, "Do you recall being asked these questions and giving these answers?" which was asked a grand total of seventeen times, the petitioner replied negatively twelve times, affirmatively once, and evasively the remainder of the times. Inasmuch as the prosecutor was not bound by the witness' answer, *People* v. *Sorge,* 301 N. Y. 198; *Iva Ikuko Toguri D'Aquino* v. *United States,* 192 F. 2d 338, 9th Circ., cert, denied 343 U. S. 935, 96 L. ed. 1343, 72 S. Ct. 772, it was perfectly proper for him to continue this line of questioning, and its duration is in many way the fault of the petitioner himself.

As to the distinction the petitioner seeks to draw between direct evidence of the crime presented by his statement as opposed to impeachment by a statement which deals only with collateral matter, we would reply that it is probably a distinction without a difference. The question is whether this Court is going to reaffirm the principle it announced in *Walder,* which essentially was that evidence legally or illegally acquired was nevertheless a valid source of impeaching a defendant's testimony. The Court in *Walder* made no pronouncement concerning

whether or not the impeaching material was or was not collateral. There it was simply expressing its indignation that perjury be thought permissible simply because the Government could not disprove it. "Such an extension of the Weeks doctrine," the Court exclaimed, "would be a perversion of the Fourth Amendment." *Walder v. United States, supra,* 347 U. S. at 65, 74 S. Ct. at 356.

Perjury is still the same predator against the integrity of the judicial system it was in 1954. It hasn't become any more benign, and, respectfully, there is no sensible reason why this Court should attenuate its standards on perjury by laying over it the mantle of judicial approval simply on the basis of what it is being used to conceal.

POINT V

The use of the inadmissible statement could well be harmless error.

When this case was in the New York Court of Appeals, the respondent conceded that the use of this statement was not harmless error. The reason for that concession was that we wanted a clear cut ruling from the Court of Appeals. Here, however, we withdraw that concession, for a couple of reasons. We feel, first, that we owe that much consideration to the learned justice of the Appellate Division who held that if it was error it was harmless. Secondly, whereas the respondent appeared before the Court of Appeals as its own representative and possibly for the sixty one other district attorneys in New York State, we appear before this Court as potentially the representative of thousands of prosecutors who will be directly influenced by this Court's decision, and we have a certain obligation to them to attempt to secure any favorable ruling which the Court might be disposed to render.

It is the petitioner's thesis under this point that the two counts of the indictment, i.e., selling heroin on January 4th (first count) and selling heroin on January 6th (second count) were disposed of differently because of the way in which the statement was used. We believe and submit to the Court that, if anything, the fact that the jury convicted on count two and failed to agree as to count one proves just the opposite.

If we begin by evaluating the case minus the statement we see that the two undercover detectives testified as to the first count that the petitioner had sold them a substance on January 4th which they later took to a laboratory. The chemist then testified that the substance so delivered to him was analyzed by him and found to be heroin. As to the first count, the petitioner testified that no transaction of any kind took place on January 4th between himself and the detectives and that on that evening he had sold them nothing whatsoever. As to the second count, the same detectives testified that again on January 6th he had again sold them a white powder which again they took to the laboratory. The chemist again testified that he had examined this powder and found it to be heroin. So far it's the same case, isn't it? But now we come to the radical difference. Now, rather than denying that transaction, *the petitioner admitted it.* His story was that the white powder he had sold the detectives was not heroin but baking powder. Now, of course, the focus of credibility had changed. If there was a certain reluctance, as apparently there was, to believe the detectives without corroboration, that corroboration had now been supplied out of the petitioner's own mouth. In this situation, then, the petitioner was not pitting his credibility against that of the detectives but against that of the chemist. That, because of the precision and the delicacy of the chemist's work and also, perhaps, because of his greater detachment than that of the detectives, made him a far more credible witness than they, and that seems to have been enough.

Now, if we go back over the case including the statement as it was used, we see that it didn't affect the outcome at all, for, although enough of it came to the jury's attention to constitute a full confession as to the first count (fol. 449-fol. 452, pp. 58-60), they could not agree. As a matter of fact, it seems to have failed of the very purpose for which it was utilized, that of impeaching the petitioners' credibility, for by their disposition of the first count the jury almost expressly stated that they could not brand his testimony as false. There is no reason for believing that they gave it more weight as to the second count.

The petitioner argues that the fact that he took a "taste" of the "baking powder" had to show the jury that it was heroin and he knew it was heroin. That doesn't necessarily follow at all. Here we have a man who has just sold to another man whom he believes is a narcotics addict a nickel's worth of baking powder, and he has charged him twelve dollars for it. For this man, an admitted narcotics addict, the refusal of the proffered "taste" would have been suicidal, for it would have exposed the fraud on the spot. There isnt' anything startling, therefore, in the petitioner's having taken back a "taste" of the baking powder.

The petitioner would be infinitely better off arguing reversible error before this Court if the jury had convicted him under both counts because there would always be some doubt in that event what contribution the statement had made. In the present case, we are able to observe from their disparate conclusions that they gave the statement no weight at all.

POINT VI

The District Attorney was under no obligation to notify the petitioner in advance of his intention to use the statement for impeachment purposes.

The petitioner here complains that in terms of the New York Code of Criminal Procedure, §813-f, the District Attorney was required to notify him in advance of his intention to use the statement. For the Court's convenience, there follows the text of Section 813-f, together with that of Sections 813-g and 813-h:

> § 813-f. Confessions and admissions; notice before use. In a case where the people intend to offer a confession or admission in evidence upon a trial of a defendant, the people must, within a reasonable time before the commencement of the trial, give written notice of such intention to the defendant, or to his counsel if he is represented by counsel.
>
> § 813-g. The motion in general. A person claiming to be aggrieved by an involuntary confession or admission may move for the suppression of such confession or admission from use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.
>
> If the motion is granted, the confession or admission shall not be admissible in evidence in any criminal proceeding against the moving party. The order granting such motion may be reviewed on appeal.
>
> If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty.
>
> § 813-h. Time of making and determination. 1. The motion shall be made returnable with reasonable diligence after receipt of such written notice from the people and prior to the commencement of any trial in

> which the confession or admission claimed to have been involuntarily obtained is proposed to be offered as evidence. If more than one defendant is named in the indictment, information, complaint or charge, the moving party shall serve the notice of motion and all the papers upon which it is made, upon each co-defendant, or upon his counsel if the co-defendant is represented by counsel. The trial shall not be commenced until the motion has been determined.

The petitioner has suggested that the District Attorney was required to notify him of his intentions to use the prior statement and to have a hearing as to its voluntariness. This argument, though, tends to devour itself. If it be pursued to its logical conclusion, it would mean that we should have sent him the notice provided for by the Code of Criminal Procedure, Section 813-f, and presumably he would have demanded the hearing provided for by Section 813-g. Assuming that the Court had found the statement to have been illegally obtained, and most assuredly he would have under the authority of *Miranda* v. *Arizona, supra,* the net outcome would have been that he would have ruled it inadmissible. However, without ever having had recourse to that judicial process, the District Attorney drew the same conclusion as to the admissibility of the statement and voluntarily suppressed it as evidence. That suppression puts the petitioner right where he would have been following the Sections 813-f and 813-g procedures if they had been decided most favorably to him. Nonetheless, he insists that he was prejudiced. It would appear that he is far more interested in the route than in the destination.

The fact is that no confession or statement was ever admitted into evidence. It was never the respondent's intention, in the words of Section 813-f:

> ". . . to offer a confession or admission in evidence upon a trial . . ."

against this petitioner, so the notice commanded by that section was unnecessary.

Moving, then, to voluntariness, the question of voluntariness was never raised at the trial, and it is submitted that this is a little late in the season for it to be raised now. Surely had the point arisen, the trial court in the jury's absence could have held the brief hearing which might have been necessary to resolve this question. We say *might* have been necessary, because on its face there is surely no flaw in the voluntariness of this statement. Petitioner was given all three of what, for want of a better word, might be called his *Escobedo* warnings, and he consciously and deliberately waived each one.

In summary, then, and despite every other consideration, this case turns largely on the Court's attitude towards *Walder* v. *United States, supra,* and it is submitted that nothing the petitioner has put before the Court warrants a renunciation of the thoroughly sound legal principle the case represents. If we examine *Walder* in some detail, it will immediately be apparent that the illegal search conducted by the federal agents violated Walder's constitutional rights, i.e., those accorded to him by the Fourth Amendment to the United States Constitution. So this Court ruled both before *Walder, United States* v. *Jeffers,* 342 U. S. 48, and after, *Mapp* v. *Ohio,* 367 U. S. 643. In its *Walder* holding, it must reasonably be concluded, the Court was sanctioning the use for impeachment of a defendant on cross-examination of unconstitutionally secured material.

To go back, then, to these cases and, respectfully, these Courts which will neither forthrightly reject *Walder* nor apply it, their failure fully to endorse it is inexplicable because the *Miranda* problem is identical. When a defendant is interrogated under circumstances where he is entitled to the *Miranda* warnings and yet they are not given to him, his constitutional rights have been violated. While

Walder's Fourth Amendment rights have been abridged, this petitioner's rights under the Fifth Amendment have been transgressed. Yet there appears to be this puzzling reluctance in the latter class of cases to accept this Court's *nihil obstat* concerning the use of of such unconstitutionally acquired material to impeach a defendant if he chooses to perjure himself.

CONCLUSION

The judgment of the New York Court of Appeals should be in each and every respect affirmed.

Respectfully submitted,

CARL A. VERGARI,
District Attorney of
Westchester County.

BY: JAMES J. DUGGAN,
Administrative Assistant District Attorney,
of Counsel.

October 7, 1970.

Appendix "A".

The Clerk: Viven Harris, do you have any further legal cause to show why sentence should not be pronounced against you at this time?

Mr. McHugh: Not in addition to those already urged, Your Honor, at this time.

The Court: Mr. Harris—

Mr. McHugh: Your Honor, I'm not so—I would want to be heard, though, on the question of the sentence.

The Court: Yes, all right.

The Clerk: Does counsel wish to address the Court?

Mr. McHugh: Yes. I was waiting for the customary question. Your Honor, Viven Harris, as you know, having examined the probation report and heard all the testimony herein, is a man 23 years old. Candor would compel me to say, though, he's not an attractive individual and hasn't had a wonderful background. He's been convicted of some violations, as your Honor knows. But the question is now, of course, not whether or not he is attractive, but what can and should be done for him. And Your Honor, there is no question, no question in my mind, and I think I know quite a bit about the New Rochelle drug situation from the number of defendants we've represented in it, the number of people we have interrogated who weren't even in it directly as defendants, that Viven Harris was one of a number of narcotic addicts who, for reasons best known to himself, Commissioner Carey decided to eliminate by having imported Detective Bermudez and Detective Parks from New York City to do their business. Now, I don't want to denegate their work unduly, but it seems to me, it seems to me some kind of an extreme application, if you will, of the law for a detective to run around, make buys, as we say in the vernacular, of narcotics from these junkies, and that's all they were, then to come into court and they are held under a sales statute,

which is very severe, Your Honor, much more severe than the Federal Law even, concerning narcotics, in a number of respects. Now, Your Honor, Viven Harris has been convicted, and I won't belabor the facts here, you heard all that at the trial, but I submit to you at the time of the sale and the time of his arrest, he was a narcotics addict. That is verified after medical and psychiatric findings that he was an addict and he was admitted to the hospital and he didn't have the good sense to stay with that and he took off. He's not a man with great sense and balance. I suppose if he were, he wouldn't be a narcotics addict in the first place. So he's had all these problems, and what term is appropriate, I daresay nobody can say precisely the number of years that's going to be required to help Viven Harris, if years at all can help him, to become a decent and law abiding citizen. But I would respectfully call to the Court's attention that prior to this trial, the District Attorney's Office had offered us to accept a plea of attempted felonious possession of a narcotic drug under 1751(3) of the narcotic law; and under that statute he could have received a sentence with a minimum of 1½ years and a maximum of 5 years. Therefore, I submit, Your Honor, that although now there is a potential minimum of 5 years, that to add any great burden to that would in effect be punishing him for going to trial. Other judges have commented on that. I needn't belabor it. I think for a man to put the State to its proof, although in some cases I know it, he is punished severely and punished harshly; I personally think it's a great wrong. If the man says I wanted to interpose and try out the issues, even if he's found guilty, I don't think he should be treated much more severely than if he pleaded guilty. He saved the expense of a trial, I suppose, if he pleaded guilty, but that's about the size of it. Taking all those things into account, Your Honor, and taking into account the very severe statute here, I do ask you to be as lenient as possible.

The Court: Mr. McHugh, may I say this for the benefit of the defendant. I don't subscribe to the argument that he, the defendant, could have pleaded to an attempt in this case and received a lesser sentence; and that by virtue of having gone to trial he, the defendant, was simply in the fulfillment of his rights. I don't agree to this. If you will accept my statement, that in fulfillment of a right, candor and truthfulness are concomitants of this right; and to commit perjury and to deliberately lie in a courtroom does not entitle a defendant to have this Court consider that he was exercising his rights. I watched this defendant in this courtroom and I felt sorry for him. I am aware he is a person of very limited background. I am aware that coming from an environment that he did down South and his difficulties down South, that these perhaps might have been little more severe in the handling of this defendant in his early days than he appears before the Court now. I am also aware that I don't think he has any concept of, morally, of peddling heroin.

Mr. McHugh: Of what, sir?

The Court: Of selling the heroin. I don't think he has any concept of it as you do or I do. I just don't think that he has a moral judgment than that he had, having been an addict. I am aware, of course, you and I both have to feel sorry for him. But the one thing he did do when he stood up in the middle of that trial and deliberately tried to create a mistrial, I am not satisfied that this defendant had any feeling that he was doing anything but seeking to hoodwink a jury.

Mr. McHugh: Your Honor, may I say something in that connection?

The Court: Yes.

Mr. McHugh: You know, it wasn't very enjoyable for us; of course, I didn't try the case, Mr. Projansky did.

The Court: Yes.

Mr. McHugh: And he was the subject of all this and it was very unfortunate, but it is my impression and I

could be wrong, that Viven Harris doesn't have the imagination to conceive—

The Court: I am much aware.

Mr. McHugh: And conceive and do the things that he did.

The Court: I am much aware that somebody, that this isn't anything of an original thought on his part.

Mr. McHugh: Right. He has come under the influence of John Smith and other jailhouse lawyers who are there, who are putting these people up to these things. He had some notes in his possession from John Smith and I think, your Honor, without judging his testimony since I didn't hear all of it, that if, and your Honor certainly did, and I bow to your Honor's characterization of it, but he said things and did things in the trial on the stand which were improper, and I certainly think they were, that he did it in mitigation, I may say, because he chose to listen to the advice of some of these jailhouse lawyers.

The Court: This is correct. And therefore, don't you see, and this is what I am saying to you, that he had a choice. He had a choice, as far as we are all concerned here, and that choice was up to him, completely. He had the benefit of your advice; I have no idea of what that is. He has had prior experience with the law. He had the choice. We didn't have the choice in here under any circumstances at all and this is the election, and this isn't what—now he comes in and says I took my right to trial and you should not penalize me. I am not penalizing him for that. He made the choice. I am not satisfied, however, that if the defendant was similarly placed at a later time will identically do the same thing, and I feel that in the past record, in his conduct, that he has time to serve. It is the Judgment of the Court that he will be sentenced to the Sing Sing State's Prison for a term the minimum of which will not be less than 6 years and the maximum of which will not be more than 8 years.

Mr. McHugh: Eight years, your Honor?

The Court: Yes.

Mr. McHugh: Thank you, your Honor.